85-1484

No. 85-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OWEN STEEL COMPANY, INC., OWEN SUPPLY COMPANY, INC., OWEN ELECTRIC STEEL COMPANY OF SOUTH CAROLINA, OWEN INDUSTRIAL PRODUCTS, INC., OWEN JOIST CORPORATION, OWEN MISCELLANEOUS METALS, INC. AND SOUTH CAROLINA STEEL CORPORATION,

Petitioners,

vs.

SOUTH CAROLINA TAX COMMISSION, JOHN T. WEEKS AS CHAIRMAN, CHARLES N. PLOWDEN AND S. HUNTER HOWARD, JR., AS COMMISSIONERS, AND CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION; AND SOUTH CAROLINA TAX BOARD OF REVIEW, JOHN W. FOSTER, AS CHAIRMAN, ISADORE BOGOSLOW, MARGARET R. DIGGS, VANCE B. DRAWDY, PAUL HEMPHILL, JOHN C. B. SMITH AND RONNIE L. SMITH AS MEMBERS, AND CONSTITUTING THE SOUTH CAROLINA TAX BOARD OF REVIEW,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTION PRESENTED

Does the Fourteenth Amendment to the Constitution of the United States proscribe the taxation of the Petitioners' property upon an assessment (valuation) equal to the property's fair market value for the 1981 tax year:

(a) When all property within six of the state's eight classes was taxed upon an assessment equal to the property's fair market value; and

(b) When property within the two other classes was taxed upon an assessment that was less than the property's fair market value; and

(c) When there was an ongoing reassessment (revaluation) program to value the property within these two classes at fair market value that was

completed and implemented the following year; and

(d) When the record clearly established that the ongoing reassessment program could not have been completed and implemented for the 1981 tax year; and

(e) When the South Carolina Supreme Court, the South Carolina Court of Common Pleas of the Fifth Judicial Circuit, the South Carolina Tax Board of Review and the South Carolina Tax Commission found that there was no intentional or invidious discrimination; and

(f) When the granting of the relief sought by the Petitioners would compound not cure the inequity?

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OPINIONS BELOW

The opinion of the South Carolina Supreme Court is set out as Appendix A in the Petition for the Writ of Certiorari. Nothing further is here added.

JURISDICTION

The jurisdiction of this Court is sought under 28 U.S.C.A. 1257(3). It, however, is respectfully submitted that jurisdiction should be declined and that the Writ of Certiorari not granted in that there is no special or important reason to grant the same.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the statutory provisions set forth in the Petition, the following is here added as:

Appendix, § 1-23-380, Code of Laws of South Carolina, 1976.

STATEMENT OF THE CASE

Under the provisions of Article X, § 1 of the Constitution of South Carolina, property is divided into eight classes for ad valorem tax purposes. Property in six of the eight classes is directly or by rule or regulation valued by the South Carolina Tax Commission. Property in the other two classes (real property used for residential purposes and real property not otherwise included in another class) is valued by the County Tax Assessor.

The Petitioners own and operate manufacturing establishments in Greenville, Lexington and Richland Counties of South Carolina. The

majority of the taxable property in each of the three counties was assessed directly or by rule or regulation of the South Carolina Tax Commission at the property's approximate fair market value.

The other property was assessed by the County Tax Assessor at less than the property's fair market value. A ratio study made by the South Carolina Tax Commission reflected the median ratios of the property assessed by the County Tax Assessor for the 1981 tax year to be 40.8% for Greenville County, 69.2% for Lexington County and 45% for Richland County. The ratio study did not include any property valued directly or by rule or regulation of the South Carolina Tax

Commission. A ratio study is the comparison of appraisals of lots or parcels in a given county to recent or current sales of those lots or parcels. The median is obviously the middle figure or ratio determined by the lots or parcels sold.[1] The Petitioners sought to require the reduction in the assessment of their property at fair market value by the average or median ratio of the property assessed by the County Tax Assessors. After a full and complete hearing, the South Carolina Tax Commission denied the reduction. Such was sustained by the South Carolina Tax

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[1] If there are insufficient sales or no appraisals, the study, though less accurate, can be made by individual appraisals compared to assessed or tax values.

Board of Review, an independent review body, the Court of Common Pleas of the Fifth Judicial Circuit and by the South Carolina Supreme Court.

The record establishes that each county was putting forth a maximum effort in personnel and funds to complete a reassessment program. Each, however, could not complete and implement the same prior to the 1982 tax year.[2]

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[2]The Assessor of Richland County stated that:

> "If the county council had appropriated $10 Million, if county council had given us 250 more people, we couldn't have moved any faster than we did." Tr., p. 147.

Similar but less dramatic statements were made by the Assessors of Lexington and Greenville Counties. The holding was that under such facts, there was no intentional or invidious discrimination. Appendix A, p. 7a of the Petition.

ARGUMENT SUMMARY

The Fourteenth Amendment is not abridged under the facts here involved by the taxation of the Petitioners' property, and the property in six of the state's eight classes, upon an assessment equal to fair market value when property in the two other classes was taxed for the 1981 tax year upon an assessment that was less than fair market value. There was in place an ongoing revaluation program to remedy the inequity and tax the property in the two classes upon an assessment equal to fair market value. It was not possible to complete and implement the program prior to 1982. All property was then taxed upon assessments that reasonably represented the property's true value.

ARGUMENT

IN OPPOSITION TO THE WRIT OF CERTIORARI

a. Jurisdiction

The Petitioners seek the Writ for this Court to review a decision of the Supreme Court of South Carolina that was rendered under the state's Administrative Procedures Act, § 1-23-380. (Appendix, p. 1a)[3]

It is significant to note that the South Carolina Tax Commission, the agency that made the assessment in the first instance, and the South Carolina Tax Board of Review, an independent agency that reviews the Tax Commission's findings, factually found that there was no intentional or invidious

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[3]The court's jurisdiction under this statute is also set forth in the Order of the South Carolina Supreme Court, pp. 3a and b of Appendix A of the Petition.

discrimination involved. The Court of Common Pleas and the South Carolina Supreme Court held the findings to be supported by reliable, probative and substantial evidence.[4]

Under the South Carolina Administrative Procedures Act, the court will not "substitute its judgment for that of the agency as to the weight of evidence on questions of fact". Section 1-23-380. See also Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304; Schudel v. South Carolina Alcoholic Beverage Control Com., 276 S.C. 138, 276 S.E.2d

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[4]The court further held that, "The Commission therefore found, which is again supported by the record, that to grant petitioners' request would not equalize the assessments, but might further compound any inequity which might exist. Petitioners would, if their request were granted, pay a disproportionate lesser tax than all others in their same class." Appendix A, p. 8a of the Petition.

308; Ellis v. Spartan Mills, 270 S.C. 216, 277 S.E.2d 590. The court applies the substantial evidence rule. In Lark v. Bi-Lo, Inc., supra, the South Carolina Supreme Court favorably quotes from Consolo v. Federal Maritime Commission, 383 U.S. 607, 620, 16 L.Ed.2d 131, 140, 86 S.Ct. 1018, 1026, as follows:

> "We have defined 'substantial evidence' as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' ... 'It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury ...' This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."

It was under this standard that the

matter was reviewed by the South Carolina courts. In support thereof, it is respectfully submitted that under the facts here involved there was no infringement upon the Petitioners' constitutionally protected rights. There was no intentional, systematic, habitual, fraudulent or invidious discrimination.

It is true that the Petitioners' property was taxed upon an assessment equal to the property's fair market value, while property in two other classes was taxed upon an assessment less than fair market value. However, that standing alone is insufficient to trigger the Fourteenth Amendment. Similar issues have been reviewed by the courts of other states. In Sperry

Corporation v. State Tax Commission, 695 S.W.2d 464, September, 1985, owners of personal property sought the reduction in the assessment of their property because real property was being taxed at a lesser percentage of value. The Supreme Court of Missouri, En Banc, denied the relief holding that there was no denial of equal protection under the Fourteenth Amendment. It is significant to note that a revaluation of the real property was ongoing and was implemented the following year.

In Alabama, a county was divided into four districts. The property within each district was reassessed on a four year cycle. It was contended that this method of assessment was unconstitutional. The Alabama Supreme Court in Hamilton v. Adkins, 250 Ala.

557, 35 So.2d 183, cert. den., 335 U.S. 861, 93 L.Ed. 407, 69 S.Ct. 133, held as follows:

> "How can there be a design or intention to discriminate when the board of equalization in all of its working time does all that it can humanly do? We think the record shows that it takes four years to review and reappraise all of the taxable units in Jefferson County. How can there be a design or intention to discriminate just because the review and reappraisal are not done in less time than men are physically able to do the job? Assuming for the sake of argument that there is the vice of discrimination in the four year plan, it's a fair question to ask how the vice can be removed? When the four year plan was completed in 1945, the board of equalization might have refused to make further reviews and appraisals. This obviously would make a mockery of the function of the board of equalization. More employees might be hired in order to make the equalization in one year. This is not a matter with which the board of equalization can be charged.

> It employed all the help allowed by law. Under the circumstances the four year plan was born of necessity and at the worst contemplates complete equalization at the end of four years. Any inequality is merely tempo ary. As we shall see when the review is merely partial, temporary and made in good faith, this tends to show lack of intention to discriminate." (See also Barnes v. Dale County Board of Equalization, 283 Ala. 437, 218 So.2d 150, where residential property was reassessed and other properties reassessed in subsequent years was held to be nondiscriminatory.)

Temporary differences in value caused by a cyclical three year valuation plan were held to be nondiscriminatory in Hillock v. Bade, 22 Ariz.App. 46, 523 P.2d 97 (1974), approved, 111 Ariz. 585, 535 P.2d 1302. There the state valued all but three classes of property, residential, agricultural and general commercial

properties, at or near market value. The three classes not valued by the state were valued by the local tax assessor. The local assessor adopted a plan to revalue these three classes over a three year period. The revaluation was according to parcel number, the lowest numbered parcel being revalued first.

In Rogan v. County Commissioners of Calvert County, 194 Md. 299, 71 A.2d 47, the Court of Appeals sustained the assessment of property by districts. The court in part held that:

> "It is not an infringement of the equal protection clause of the Fourteenth Amendment for a statute to authorize the assessment of the same classes of property in different districts in different years, or the assessment of different classes of property in different years."

An annotation regarding this issue

is found in 76 A.L.R.2d 1077. See also May Department Stores v. State Tax Commission, 308 S.W.2d 748 (1958 Mo.); Citizens Committee v. Warner, 127 Colo. 121, 254 P.2d 1005 (1953); Carkonen v. Williams, 76 Wash.2d 617, 458 P.2d 280 (1969) and Dore v. Kinnear, 79 Wash.2d 755, 489 P.2d 898 (1971).

The above clearly reflects that the issue here presented is not novel to South Carolina. A compelling governmental need for a reasonable time in which to correct the matter is evident. The issue involves the 1981 tax year and the inequity was cured the following year.

The decisions of this Honorable Court on somewhat related issues support the decision of the South Carolina Supreme Court. In Sunday Lake Iron Co.

v. Wakefield, 247 U.S. 350, 38 S.Ct. 495, 62 L.Ed. 1154, it was held that:

> "The record discloses facts which render it more than probable that plaintiff in error's mines were assessed for the year 1911 (but not before or afterwards) relatively higher than other lands within the county although the statute enjoined the same rule for all. But we are unable to conclude that the evidence suffices clearly to establish that the state board entertained or is chargeable with any purpose or design to discriminate. Its action is not incompatible with an honest effort in new and difficult circumstances to adopt valuations not relatively unjust or unequal. When plaintiff in error first challenged the values placed upon the property of others no adequate time remained for detailed consideration nor was there sufficient evidence before the board to justify immediate and general revaluations. The very next year a diligent and, so far as appears, successful effort was made to rectify any inequality. The judgment of the court below must be
>
> Affirmed."

Here the record establishes that a reduction in the assessment of property in the six classes to the medium level of the other two classes would have catastrophic effect upon the counties (including schools and other taxing entities). At the time the matter was heard, most tax notices had been mailed or otherwise finalized. Section 12-39-150 provides that the tax duplicate is furnished by the county auditor to the county treasurer "on or before the thirtieth day of September[5] annually as his warrant for the collection of taxes, assessments and penalties charged thereon". The matter herein was heard by the South Carolina

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[5]Each year some counties obtain extensions of this date because the records cannot be completed by that date.

Tax Commission and its decision issued November 16, 1981. At that time, it was impossible to equalize the values for the 1981 tax year. Because, however, some property within the two classes was valued above and some below the medium, equalization would have compounded not cured the inequity.

Greene v. Louisville & Interurban R. Co., 244 U.S. 499, 37 S.Ct. 673, 61 L.Ed. 1280, is likewise not here applicable. In that case, the assessment of one class at a higher proportion of value than another class was intentional and fraudulent. There was no ongoing program to correct the situation in the next ensuing year. Here, it cannot be said that the actions of the county assessor were fraudulent. Every effort possible was being made to

tax the property of all classes at fair market value.

In Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340, 28 A.L.R. 979, the court held as follows:

> "This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. * * *."

The Supreme Court of New Mexico in Skinner v. New Mexico Tax Commission, 66

N.M. 221, 345 P.2d 750, 76 A.L.R.2d 1071 (1959), commented on these cases as follows:

> "This is not a case where one or a few taxpayers are arbitrarily assessed at a higher level than others, as in Sioux City Bridge Co. v. Dakota County, Neb., 1923, 260 US 441, 43 S Ct 190, 67 L ed 340, 28 ALR 979; nor where a single industry is discriminated against, as in Greene v. Louisville & Interurban R. Co. 1917, 244 US 499, 37 S Ct 673, 61 L ed 1280, Ann Cas 1917E 88. It is more analogous to the situation in Sunday Lake Iron Co. v. Township of Wakefield, 1918, 247 US 350, 38 S Ct 495, 62 L ed 1154, where a reappraisal program was commenced but in one year re-assessment was completed on mining properties only. There, the Supreme Court of the United States refused to interfere and allowed the assessment to stand, even though there was an obvious but temporary inequality."

It is thus respectfully submitted that this Honorable Court should decline

jurisdiction and deny the Writ of Certiorari.

b. Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201

The jurisdiction of the Supreme Court of the United States to determine if there has been a denial of the protection afforded by the Fourteenth Amendment is not controverted. It, however, is respectfully submitted that the court should decline jurisdiction and deny the Writ of Certiorari.

Rule 17 of this Court provides the guide for the review. Subsection 1(c) provides in part that the Writ may be granted:

> "When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

The issue here is whether there are sufficient facts in the record to support the findings and holdings that there was no intentional or invidious discrimination. Two agencies and two of the courts including the highest of the state held that there was none.

c. The South Carolina Decision - Appendix A of the Petition

The Petitioners would lead this Court to the believe that the South Carolina Supreme Court has issued an opinion in conflict with prior opinions. The South Carolina Court did not hold that property was not to be equally and uniformly assessed within the respected classes. It did not hold that property was to be taxed upon a value other than the property's actual or market value. All the court held was that under the facts and circumstances in this case,

there was no intentional or invidious discrimination.

d. History

In 1975, by Act 208, Acts of 1975, the General Assembly required each of the state's forty-six counties to employ a property tax assessor.[6] The Act also required that property be uniformly and equitably assessed throughout the state.[7] The South Carolina Tax Commission was given the responsibility to insure the equalization.[8] However, because of fiscal and personnel restraints, this could not be

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[6]Section 12-37-90 of the South Carolina Code of Laws, 1976.

[7]Section 12-43-210 of the South Carolina Code of Laws, 1976.

[8]Section 12-43-210 of the South Carolina Code of Laws, 1976.

accomplished before 1982. As the record reflects, there was not an adequate pool of trained appraisers to draw from. This necessitated time delays in order to train and bring the appraisers to a satisfactory standard.[9]

The funding levels for the reassessment within the three counties required substantial appropriations by the counties. The record reflects that each of the three counties provided this

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[9]"Mr. Allen: Mr. Crider, is there available an unlimited supply of trained appraisers?

Mr. Crider: No, sir. At the time that Act 208 passed, practically every county in the state was buying from the same expertise. The county was unable to find qualified personnel, which necessitated them employing people and training them in the respective areas that they needed expertise in. So it was a very difficult thing to find qualified personnel." Tr., p. 093.

funding.[10] It is thus evident that the time between 1975 and 1982 was necessary to the governmental purpose of obtaining uniformity and equality in taxation. The Fourteenth Amendment is to be applied in a real world. It is not to be taken in isolation and applied arbitrarily. It cures not compounds inequality.

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[10]Transcript, p. 091 for Greenville County; p. 136 for Lexington County and p. 145 for Richland County.

CONCLUSION

It is respectfully submitted that this Honorable Court should decline jurisdiction and deny the Writ.

Respectfully submitted,

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March 25, 1986

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of March, 1986, three copies of a Brief In Opposition To Petition For Writ Of Certiorari were mailed by depositing same in the United States Post Office at Columbia, South Carolina, with first class postage prepaid, addressed to Terrell L. Glenn, Esq., Theodore J. Hopkins, Jr., Esq., Robert E. Stepp, Esq., McNair, Glenn, Konduros, Corley, Singletary Porter & Dibble, P.A., Post Office Box 11390, Columbia, South Carolina 29211.

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APPENDIX

§1-23-380. Judicial review upon exhaustion of administrative remedies.

(a) A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this article and Article 1. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) Proceedings for review are instituted by filing a petition in the circuit court within thirty days after the final decision of the agency or, if a rehearing is requested, within thirty days after the decision thereon. Copies of the petition shall be served upon the agency and all parties of record.

(c) The filing of the petition does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

(d) Within thirty days after the service of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party

unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(f) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences,

conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.